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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD ALLEN GANT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE FIFTH CIRCUIT'S TEST OF REQUIRING AN OFFICER'S RELIANCE UPON A WARRANT TO BE "ENTIRELY UNREASONABLE" IS CONSISTENT WITH THIS COURT'S "OBJECTIVE REASONABLENESS" STANDARD IN *LEON*?

2. WHETHER AN OFFICER IS ENTITLED TO RELY IN GOOD-FAITH UPON A DEFECTIVE WARRANT HE HAS NOT EVEN READ?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, RICHARD ALLEN GANT, petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause May 6, 1985, said judgment being upheld by the Court of Appeals on December 17, 1986.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 759 F.2d 484 and is printed as Appendix "A" hereto. The opinion of the District Court is reported at 587 F.Supp. 128 and is printed as Appendix "B" hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1985. Said judgment was upheld by the Court of Appeals on December 17, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) by timely filing this Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

The State of Texas first prosecuted Petitioners RICHARD ALLEN GANT and DEBORAH CORRINE SCHNEIDER for possession of cocaine after execution of the search and arrest warrant in question at Gant's home occurred on October 31, 1980. The same Fourth Amendment issues concerning the warrant's validity were answered adversely to the Government on the basis of evidence presented at a State District Court hearing on Gant and Schneider's motions to suppress and, as a result, state indictments against each were dismissed on Prosecution's motion made January 29, 1981, which asserted a "bad search warrant" as the ground for dismissal [R. Vol. I, p. 81].

Some 2½ years later, Richard Gant and co-defendant Deborah Schneider were subsequently indicted on federal charges for the same offense.

Both Gant and Schneider again filed pre-trial motions to suppress and same were granted after a hearing before the District Court by written order dated January 24, 1984, which found the officers had not acted in objective good-faith upon the warrant.

The United States appealed and a panel of the Fifth Circuit Court of Appeals reversed. *U.S. v. Gant,* 759 F.2d 484 (5th Cir. 1985).

Defendant Gant was sentenced on April 29, 1986. On December 16, 1986, the Fifth Circuit upheld its decision in *U.S. v. Gant,* 759 F.2d 484 (5th Cir. 1985).

STATEMENT OF RELEVANT FACTS

On October 31, 1980, a search warrant was issued for the search of the residence described as "11006 Francoise, Houston, Texas, and for the arrest of Richard Allen Gant, Deborah Schneider and Carlos Ivan Orozco." On executing the search warrant, agents seized evidence implicating Petitioner Gant.

The affidavit disclosed that Officer Martinez received a phone call from his anonymous informer who said that "his source" said that Gant was about to leave for Florida to obtain a load of cocaine. Consequently, surveillance was again initiated. On October 29, 1980, defendant Schneider was seen in a black Cadillac Eldorado, license plates number VFV754, driving eastbound on Interstate 10 in the Houston area. The affidavit stated that the vehicle was seen "October 29 as it remained eastbound having crossed into Trinity County, Texas . . . in the most direct route to Florida," a state approximately 1,000 miles away. However, as pointed out at the suppression hearing, Interstate 10 does not pass through Trinity County; Trinity County is due north of Harris County,

not due east. The affidavit further gave no indication of who Schneider was, or what her relationship might be to Gant or any alleged illegal activities. Two days later, the same vehicle was reported as being seen in the Houston area traveling west on Interstate 10, being driven by Petitioner Gant.

The vehicle stopped at a convenience store where Martinez watched Gant make a brief telephone call. Gant and Schneider then proceeded to Gant's house, which was located five minutes away. Both Gant and Schneider appeared tired, and their automobile showed "road dust and travel wear."

Lastly, the affidavit stated that "your affiant believes the cocaine to be inside said place based on the informant's having seen Gant and Carlos Ivan Orozco (an alleged cocaine distributor) . . . together at the said place on a prior occasion and surveillance has failed to show any place of greater relative security for the transactions to be carried on. *U.S. v. Gant,* 587 F.Supp. 128, 132 (S.D. Tex. 1984). No information was provided from which one might even imply when this prior observation occurred.

Based on these facts, officers obtained and executed the warrant on Gant's residence.

REASONS FOR GRANTING THE PETITION

Having established the "good-faith" exception in *Leon,* this case presents the Court with the question of whether *Leon's* objective good-faith standard is compatible with the Fifth Circuit's "test" requiring a showing that the officer acted "entirely unreasonably", as well as the narrower question of whether an officer's reliance upon a warrant can ever be objectively reasonable where he fails to even read same.

LEON'S OBJECTIVE GOOD-FAITH STANDARD IS NOT COMPATIBLE WITH THE FIFTH CIRCUIT'S "TEST" REQUIRING A SHOWING THAT THE OFFICER ACTED "ENTIRELY UNREASONABLY"

The Fifth Circuit's "test" that these officers' reliance upon the warrant should be upheld because it was not "entirely unreasonable", *U.S. v. Gant, Supra,* 759 F.2d at p. 488, cannot be squared with this Court's insistence that an officer's reliance upon a magistrate's determination of probable cause be "objectively reasonable", viewed from the standpoint of a "knowledgeable", and "well-trained officer". *U.S. v. Leon,* 468 U.S. ____, 104 S. Ct. 3405, 3422 (1984).

> "Accordingly, our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *U.S. v. Leon,* 468 U.S. ____, 104 S. Ct. 3405, 3422 (1984).

By concentrating *solely* on the question of whether it was entirely unreasonable for the officers to accept the magistrate's belief, the Fifth Circuit slights this Court's requirement that ". . . the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable". *U.S. v. Leon, Supra,* 104 S. Ct. at p. 3421.

THE NEXUS REQUIREMENT IS A NON-TECHNICAL BEDROCK PRINCIPLE OF FOURTH AMENDMENT LAW

There is no better settled Fourth Amendment principle than that probable cause must relate to the person

or place to be searched. *See,* e.g. *Segura v. U.S.,* 468 U.S. ____, 104 S. Ct. 3380, 82 L.Ed.2d 599, 612 (1984); *U.S. v. Ross,* 456 U.S. 798, 824, 102 S. Ct. 2157 (1982); *Steagald v. U.S.,* 451 U.S. 204, 101 S. Ct. 1642 (1981); *Torres v. Puerto Rico,* 442 U.S. 465, 471, 99 S. Ct. 2425 (1979); *Berger v. New York,* 388 U.S. 41, 87 S. Ct. 1873, 1888 (1967); and *Brinegar v. U.S.,* 338 U.S. 160, 175-76, 67 S. Ct. 1302, 1310-1311 (1949).

Only recently this court reiterated that "the sanctity of the home is not to be disputed." *Segura v. U.S.,* 468 U.S. ____, 104 S. Ct. 3380 (1984). "Indeed, one's dwelling has generally been viewed as the area most resolutely protected by the Fourth Amendment." *LaFave, Search and Seizure:* Vol. 1, § 2.3 at p. 290 (1978).

THE HEIGHTENED EXPECTATION OF PRIVACY SHOULD NOT CONSTITUTE A JUSTIFICATION FOR INVADING THAT PRIVACY

The Fifth Circuit's opinion in *Gant* accepts the Government's argument that a well-trained officer would believe there is probable cause to search a residence simply because ". . . surveillance has failed to show any place of greater relative security for the transactions to be carried on." *U.S. v. Gant, Supra,* 759 F.2d at p. 488. The only nexus between the suspected evidence and Petitioner Gant's apartment is its status as a residence. The Government should not be able to utilize the traditional heightened expectation of privacy accorded a residence as the justification for invading that privacy.

A REASONABLY WELL-TRAINED OFFICER SHOULD BE AWARE OF THE NEXUS REQUIREMENT

While it may be arguable that there were "other factual allegations in the affidavit" that Gant had obtained a load of cocaine, the *only* evidence that same would be located at Petitioner Gant's residence was the officer's inability to discover "any place of greater security for the drug transactions". *U.S. v. Gant, Supra,* 759 F.2d at p. 488.

In a city the size of Houston, Texas,[1] Officer Martinez' self-serving assertion that he "believes the cocaine to be inside" Gant's residence because his "surveillance failed to reveal any place of greater relative security" than that individual's home, not only fails to demonstrate such a reasonable nexus to the residence, it borders on the preposterous.

The fact that affiant Martinez had to stretch to these lengths to include Gant's residence is tantamount to a recognition that he realized the law requires a clear nexus between the evidence sought and the residence searched; as well as the fact that his information fell woefully short of providing same.

> ". . . The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits." (citation omitted) *U.S. v. Leon, Supra,* 104 S. Ct. at p. 3420.

Any reasonably well-trained officer with even a fleeting knowledge of the requisites for issuing a warrant to

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1. The Metropolitan area of Houston encompasses 6922.24 *square miles* and 3½ million people. Houston Chamber of Commerce, *Houston Facts.*

search a private residence knows his probable cause must relate to and justify searching the particular residence he seeks to enter. It is obvious from the face of the instant affidavit that Officer Martinez was cognizant of this "nexus" requirement and was unable to satisfy same.

> "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily,* 426 U.S. 547, 556, 98 S. Ct. 1970, 1976, 56 L.Ed.2d 525 (1978).

THE DISTRICT COURT RECOGNIZED THAT FOURTH AMENDMENT VALUES WOULD BE —— SERVED BY SUPPRESSION

This Court in *Leon* recognized that Fourth Amendment values might require suppression even where a warrant was obtained:

> "We do not suggest, however, that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms . . . the officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *U.S. v. Leon, Supra,* 104 S. Ct. at p. 3421.

Suppression in this case would be in keeping with the *Leon* requirement that officers are charged with a minimum level of knowledge of the law's requirements.

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained

> from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, *or may properly be charged with knowledge,* that the search was unconstitutional under the Fourth Amendment." *U.S. v. Leon, Supra,* 104 S. Ct. at 3419-20 (quoting *U.S. v. Peltier,* 422 U.S. 531, 542, 95 S. Ct. 2313, 2320, 45 L.Ed.2d 374 (1975). (emphasis added).

And the District Court was correct in recognizing that Fourth Amendment values would be served by suppression.

> "Finally, the Court believes that a deterrent effect is accomplished by the suppression of the fruits of the search in this case. . . . The legal precedent for establishing a nexus between the evidence sought and the place to be searched is well established. To ignore it now might well promote what the exclusionary rule was designed to prevent." *U.S. v. Gant,* 587 F.Supp. at p. 134 (1984).

THIS COURT SHOULD CLEARLY SET OUT THE PROPER STANDARD FOR REVIEWING A TRIAL COURT'S DETERMINATION OF AN OFFICER'S "GOOD-FAITH" RELIANCE UPON A SEARCH WARRANT: WHETHER TO EMPLOY *DE NOVO* REVIEW OF A "CLEARLY ERRONEOUS" STANDARD

In light of the deference generally accorded trial court determinations, the question of what standard Appellate Courts should employ in reviewing a District Court's findings as to whether police officers acted in good-faith reliance upon a search warrant is a timely issue of considerable import. The Court of Appeals opinion below fails to articulate whether the Court will review such a

determination "*de novo*", or only upon a showing that the Trial Court's evaluation of the evidence and witnesses was "clearly erroneous".

The Fifth Circuit's opinion states that "the determination of good-faith will ordinarily depend on an examination of the affidavit by the reviewing court." *U.S. v. Gant, Supra,* 759 F.2d at pp. 487, 488.

Such *"de novo"* review is in direct conflict with previous decisions applying a "clearly erroneous" test.

> "We further note that the trial court's findings of fact on a motion to suppress must be accepted unless clearly erroneous. *U.S. v. Griffin,* 555 F.2d 1323, 1324 (5th Cir. 1977); *U.S. v. Horton,* 488 F.2d 374, 380 (5th Cir. 1973), *cert. denied,* 416 U.S. 993, 94 S. Ct. 2405, 40 L.Ed.2d 772 (1974)." *U.S. v. Duckett,* 583 F.2d 1309, 1313 (1978).

Not surprisingly, Courts have recently applied the "clearly erroneous" standard to affirm a District Court's finding that a police officer relied in "good-faith" upon an invalid search warrant. *U.S. v. Mahoney,* 712 F.2d 956, 960 (5th Cir. 1983). In *Mahoney,* the Fifth Circuit applied the "clearly erroneous" standard in refusing to overturn the Trial Court's finding that officers there *had* exhibited good-faith reliance on an invalid arrest warrant. *U.S. v. Mahoney, Supra,* at pp. 960-1.

> " '[T]he [District] Court . . . found that the officers executed the arrest warrant in the belief that it was valid'. *We cannot conclude that this finding of good-faith is clearly erroneous." Id.* at p. 960-961. (emphasis added).

The District Court below viewed the witnesses and had the opportunity to assess their credibility in determining

whether their asserted good-faith was "grounded in an objective reasonableness" and "based upon articulable premises sufficient to cause a reasonable, and reasonably trained officer to believe that he was acting lawfully." *U.S. v. Williams,* 622 F.2d 830, 841, n. 42 (5th Cir. 1980). *U.S. v. Leon, Supra.*

Based upon the evidence provided at the suppression hearing, the District judge entered a "finding of fact" that he could not find "that the conduct of the officers in question was taken in a reasonable, good-faith belief that it was proper." *U.S. v. Gant, Supra,* 587 F.Supp. at p. 136.

> "While it is not the district court's function to make law, it is its function to make findings of fact. Given the evidence provided at the suppression hearing in this case, this Court, either because of a lack of evidence presented or because of a lack of evidence in existence, could not make a finding, as government requested, that the conduct of the officers in question was taken in a 'reasonable, good-faith belief that it was proper.' Without such a finding, the Court was impelled to apply, and did apply, the exclusionary rule to suppress the evidence secured by the illegal search and seizure." *U.S. v. Gant, Supra,* 587 F.Supp. at p. 136.

The trial court's finding was not "clearly erroneous" and should not be disturbed.

> "In reviewing a trial court's ruling on a motion to suppress based on live testimony at a suppression hearing, the trial court's purely factual findings must be accepted unless clearly erroneous, or influenced by an incorrect view of the law, and the evidence must be viewed in the light most favorable to the party prevailing below, except where such a view

is either not consistent with the trial court's findings or is clearly erroneous considering the evidence as a whole. *U.S. v. Maldonado,* 735 F.2d 809, 814 (5th Cir. 1984). *See also*: *U.S. v. Gomez-Diaz,* 712 F.2d 949, 951 (5th Cir. 1983), *cert. denied,* ____ U.S.____, 104 S. Ct. 731, 79 L.Ed.2d 191 (1984); *U.S. v. Pozos,* 697 F.2d 1238, 1243 (5th Cir. 1983); *U.S. v. Ehlebracht,* 693 F.2d 333, 337 n. 6 (5th Cir. 1982); *U.S. v. Sanford,* 658 F.2d 342, 343 (5th Cir. 1981), *cert. denied,* 455 U.S. 991, 102 S. Ct. 1618, 71 L.Ed.2d 852 (1982); *U.S. v. Vargas,* 643 F.2d 296, 297 (5th Cir. 1981); *U.S. v. Metz,* 608 F.2d 147, 154 (5th Cir. 1979), *cert. denied,* 449 U.S. 821, 101 S. Ct. 80, 66 L.Ed.2d 24 (1980); *U.S. v. Duckett,* 583 F.2d 1309, 1313 (5th Cir. 1978).

THE OFFICER'S RELIANCE ON THE SEARCH WARRANT COULD NOT BE "OBJECTIVELY REASONABLE" WHERE IT WAS NOT READ

This Court stated in *Leon* that "in the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination . . . after the warrant issues there is literally nothing more the policeman can do in seeking to comply with the law". *U.S. v. Leon, Supra,* 104 S. Ct. at p. 3420. In the case at bar, the officers could do more to comply with the law—they could read the warrant. An unread warrant can only be relied upon in subjective good-faith. The *Leon* opinion made clear that such "subjective" good-faith is insufficient. Rather, an officer's reliance on a warrant must be reasonably based upon objective standards.

> "We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good-faith of individual of-

> ficers. 'Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.' " *U.S. v. Leon, Supra,* 104 S. Ct. 3405, 3420 n. 20 (1984).

Yet the Fifth Circuit opinion ignored the lower court's express finding that the officer's reliance on the warrant in the case at bar must of necessity be entirely subjective:

> "The officers merely elaborated upon their 'good-faith reliance' upon a warrant *which they did not even read.* Such subjective good-faith has been patently condemned as a rationale for applying the good-faith exception to the exclusionary rule." *U.S. v. Gant,* 587 F.Supp. 128 at p. 134 (1984). (emphasis added).

OBJECTIVE GOOD-FAITH SHOULD NOT BE MEASURED BY WHAT "COULD" HAVE HAPPENED

The Fifth Circuit stated in its opinion that "other factual allegations in the affidavit, however, could be viewed to support the officer's reliance on the magistrate's probable cause determination." *U.S. v. Gant, Supra,* at p. 487.

Petitioner Gant submits it is not whether there were other allegations the officers *could* rely on, but the District Court's fact determination that the officers failed to read the warrant and hence *didn't rely* in objective good faith. Such a failure is the sort of negligence this Court noted continues as a valid reason to suppress evidence.

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, *or at the very least negligent conduct,* which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *U.S. v. Leon,* 468 U.S. ____, 104 S. Ct. at p. 3419 (1984). (emphasis added).

OBJECTIVE REASONABLENESS MUST BE APPLIED TO ALL THE OFFICERS INVOLVED

Even though the District Court did not have the benefit of the *Leon* opinion, it foresaw precisely what this Court in *Leon* held: that the objective reasonableness standard must be applied collectively to *all* of the officers involved.

> "Reference to 'officer' throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a 'bare bones' affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. *See: Whitley v. Warden,* 401 U.S. 560, 568, 91 S. Ct. 1031, 1037, 28 L.Ed.2d 316 (1971)." *U.S. v. Leon,* 468 U.S. ____, 104 S. Ct. 3405, 3421 n. 24.

In the case at bar, the officer who executed the warrant testified that he was not present when Deputy Martinez

drafted the search warrant [R. Vol. II, p. 1, ll. 21-23], or when it was signed [R. Vol. II, p. 38, ll. 3-5]. The first time he actually saw the warrant was after he was inside the residence [R. Vol. II, p. 28, ll. 9-11], and he admitted that he "presumed", but did not know, what the warrant authorized [R. Vol. III, p. 31, ll. 4-22].

How then could the executing officer rely on the "other factual allegations in the affidavit [which] could be viewed to support the officer's reliance on the magistrate's probable cause determination"? *U.S. v. Gant,* 759 at p. 488.

This Court in *Leon* addressed this "willful ignorance" rationale and laid it to rest.

> "[T]he requirement that the officer act in 'good-faith' is inconsistent with closing one's mind to the possibility of illegality." *U.S. v. Leon, Supra,* at p. 3420.

The officers here not only closed their minds, they closed their eyes.

THE OFFICERS DID NOT TAKE EVERY STEP THAT COULD REASONABLY BE EXPECTED OF THEM

U.S. v. Leon's companion case, *Massachusetts v. Sheppard,* 468 U.S. ____, 104 S. Ct. 3424 (1984), dealt with an officer applying for a warrant who failed to read a defective warrant *after* he had been assured by a magistrate that necessary changes had been made. This Court stated that "the officers in this case took every step that could reasonably be expected of them." *Massachusetts v. Sheppard,* 104 S. Ct. at p. 3429. Notwithstanding, this Court cautioned:

> "Normally, when an officer who has not been involved in the application stage receives a warrant,

> he will read it in order to determine the object of the search. . . . Whether an officer who is less familiar with the warrant application or . . . scope of the search would be justified in failing to notice a defect like the one in the warrant in this case is an issue we need not decide. We hold only that it was not unreasonable for the police in this case to rely on the judge's assurances that the warrant authorized the search they had requested." *Massachusetts v. Sheppard*, 104 S. Ct. at p. 3429 fn. 6.

To allow officers to maintain they acted in good-faith reliance upon a warrant that they had not seen or read, would allow the officers to exit the same negligent window they entered. At the very least, it would tend to discourage officers from reading the judicial directives they are charged with enforcing.

Certainly, an officer's reliance upon a warrant he had not even read should not shield from scrutiny an affidavit which would not warrant reliance by any reasonably well-trained officer who chose to review its contents. Otherwise, as this Court recognized in *U.S. v. Leon*, an officer could submit a facially deficient affidavit, "and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search." *U.S. v. Leon*, 468 U.S.____, 104 S. Ct. 3405, 3421 (1984).

AT LEAST A REMAND IS APPROPRIATE

It is clear the District Court below did a remarkable job in attempting to forecast this Court's good-faith exception to the exclusionary rule. However, the suppression hearing was conducted and the trial court's findings were made prior to and without the benefit of this Court's opinions in *Leon* and *Sheppard*.

In such a case, at the least, a remand is appropriate so that "all of the circumstances . . . may be considered" by the District Court hearing the evidence and the testimony of the officers in the first place. *U.S. v. Leon*, 468 U.S. ___, 104 S. Ct. 3405, 3421 n. 23 (1984).

> "We therefore feel it best to remand the case to the district court, where the parties shall be afforded a hearing on the good-faith issue. The district court, guided by *Leon* and *Sheppard*, and this opinion, then may determine whether the officers acted in good-faith." *U.S. v. Accardo*, 749 F.2d 1477, 1481 (11th Cir. 1985).

CONCLUSION

In light of the substantial issues raised, Petitioner respectfully prays this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Petition for Writ of Certiorari have been mailed to United States Solicitor General, Rex E. Lee, Esq., Department of Justice, Room 5614, Washington, D.C. 20530 and to the U.S. Attorney's Office, Southern District of Texas, Galveston Division, on this the _____ day of March, 1987.

GERALD H. GOLDSTEIN

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellant,

v.

Richard Allen GANT, John Roger Casquilla,
and Deborah Corrinne Schneider,
Defendants-Appellees.

No. 84-2342.

United States Court of Appeals,
Fifth Circuit.

May 6, 1985.

Defendants charged with conspiracy to violate the narcotics laws and possession of cocaine with intent to distribute moved to suppress evidence. The United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., 587 F.Supp. 128, granted the motion, and Government appealed. The Court of Appeals, Clark, Chief Judge, held that affidavit of deputy sheriff was not so inadequate as to render official belief in existence of probable cause to search residence for cocaine entirely unreasonable, where affidavit contained facts which could readily support magistrate's inference that defendant had obtained a load of cocaine from Florida and that it was still in his possession at his residence, and thus good-faith exception to exclusionary rule applied and evidence seized in search should not have been suppressed.

Reversed.

Daniel K. Hedges, U.S. Atty., James R. Gough, Samuel G. Longoria, Asst. U.S. Attys., Houston, Tex., for plaintiff-appellant.

Edward A. Mallett, Houston, Tex., for defendants-appellees.

Gerald Goldstein, San Antonio, Tex., for Gant.

Roland E. Dahlin, II, Thomas S. Berg, Houston, Tex., for Schneider.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GOLDBERG, and TATE, Circuit Judges.

CLARK, Chief Judge:

The United States appeals the suppression of evidence obtained during a warranted search. The district court concluded that probable cause was lacking and that the law enforcement officers who conducted the search did not rely on the warrant in good faith. Finding that the officers did act with objective good faith, we reverse.

I

Richard Allen Gant, John Roger Casquilla, and Deborah Corrinne Schneider are charged with conspiracy to violate the narcotics laws and possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841 (a)(1) & 846. Gant and Schneider moved to suppress evidence obtained during a warranted search of Gant's home. Schneider also contended that probable cause to issue a warrant for her arrest was lacking because the affidavit did not link her with any criminal activity.

After a hearing, the district court concluded that the magistrate had issued the warrant without probable cause. The court also concluded that the officers who executed the warrant did not rely on it in good faith. The government made a motion for reconsideration, which the court denied. See *U.S. v. Gant*, 587 F.Supp. 128 (S.D. Tex. 1984).

A

The warrant was issued on the basis of the affidavit of J.M. Martinez, a county deputy sheriff. The affidavit detailed observations of Martinez and other law enforcement officers, as well as information obtained by Martinez from an informant. According to the affidavit, the informant told Martinez that both the informant and Gant had purchased drugs from the same source. The informant knew Gant's address and had known Gant for some time. The informant indicated that Gant was a member of a cocaine distribution network in Houston, Texas. The informant also stated that Gant had bragged about his activities as a dealer and had explained how he would obtain cash for a deal, drive to Florida from Houston, and obtain the cocaine. The cocaine was distributed immediately upon Gant's return to Houston.

The informant's allegations corroborated plea bargain information provided by the local prosecutor. Martinez and United States Drug Enforcement Administration officers began surveillance of Gant. On one occasion, Gant and another member of the cocaine distribution network were seen together at Gant's house. On another occasion, an officer followed Gant to a local bank where the officer watched Gant withdraw an unknown quantity of cash in a lengthy transaction which required two tellers

to count the money. Meanwhile, another member of the distribution network named by the informant had been arrested in San Diego for possession of cocaine. At the time of his arrest, the individual was boarding an airplane to Houston. He admitted working for the distribution network and that the cocaine came from Florida.

Deputy Martinez received a telephone call from the informant. The informant notified Martinez that Gant was about to go to Florida to obtain a load of cocaine. Martinez observed Schneider driving east toward Florida on an interstate highway in the Houston area. Two days later, Martinez saw the vehicle heading west into Houston on the same highway. The vehicle stopped at a convenience store where Martinez watched Gant make a brief telephone call. Gant and Schneider then proceeded to Gant's house, which was located five minutes away. Both Gant and Schneider appeared tired, and their automobile showed a noticeable accumulation of road dust and travel wear. Based on these affidavit facts, officers obtained and executed the warrant on Gant's residence that afternoon. They found five pounds of high purity cocaine.

B

The United States challenges the district court's resolution of the probable cause issue. The government contends that the magistrate's determination of probable cause was reasonable and entitled to deference because the affidavit contained sufficient information for the magistrate to conclude that cocaine was being concealed at Gant's house. Alternatively, the government argues that the evidence should not have been suppressed even

if probable cause was lacking. The government maintains that the officers relied in good faith on the sufficiency of the warrant. We agree. Because we find that the officers acted in objective good faith, we need not resolve the probable cause issue.

II

Following the district court's decision in this case, the United States Supreme Court isued its decision in *United States v. Leon,* ____U.S.____, 104 S. Ct. 3405, 82 L.Ed. 2d 677 (1984). In *Leon,* a confidential informant had named two suspects who were distributing large quantities of cocaine and methaqualone. Based on the information received from the informant, police officers began an investigation which led to the discovery of two additional suspects. Another informant told police officers that one of the suspects stored drugs in his house. The police officers obtained a warrant to search several residences and automobiles belonging to the suspects and, upon executing the warrant, discovered large quantities of drugs and other evidence.

The defendants moved before trial to suppress the evidence seized by the police in the warranted searches. The district court partially granted the motions after an evidentiary hearing because the affidavit used to apply for the warrant was insufficient to establish probable cause. On review, the Supreme Court refused to reach the probable cause issue. Instead, the Court crafted an exception to the exclusionary rule by admitting evidence obtained by officers acting in objectively reasonable reliance on the warrant issued by a detached and neutral magistrate.

A

The Supreme Court's adoption of a good-faith exception to the exclusionary rule was foreshadowed four years earlier by our decision in *United States v. Williams,* 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127, 101 S. Ct. 946, 67 L.Ed.2d 114 (1981). *See also Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 2336, 76 L.Ed.2d 527 (1983) (White, J., concurring); *Stone v. Powell,* 428 U.S. 465, 496, 96 S. Ct. 3037, 3053, 49 L.Ed.2d 1067 (1976) (Burger, C.J., concurring). The district court in the present case applied the *Williams* form of the good-faith exception when it decided that the officers did not rely in good faith on the invalid warrant. The Supreme Court's decision in *Leon* moots any consideration of whether the district court correctly applied our holding in *Williams;* in the context of a search based on a subsequently invalidated warrant, it is the *Leon* standard that we must now apply.

Citing the deterrence of police misconduct as the primary purpose of the exclusionary rule, the Supreme Court in *Leon* concluded "that the marginal or non-existent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." 104 S. Ct. at 3421. The Court noted that warranted searches would rarely require any extensive deliberation over reasonableness because " 'a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.' " *Id.* (quoting *United States v. Ross,* 456 U.S. 798, 823 n. 32, 102 S. Ct. 2157, 2172 n. 32, 72 L.Ed.2d 572 (1982)). The Court emphasized, however, that the law enforcement officer's reliance on the

magistrate's determination of probable cause had to be objectively reasonable. According to the Court, evidence seized in reliance on a warrant may still be suppressed if one of four criteria is met:

1) the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed.2d 667 (1978));

2) the magistrate abandoned his judicial role and failed to perform his neutral and detached function (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L.Ed.2d 920 (1979));

3) the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11, 95 S. Ct. 2254, 2265-66, 45 L.Ed.2d 416 (1975) (Powell, J., concurring)); or

4) the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized (citing *Massachusetts v. Sheppard*, ___U.S.___, 104 S. Ct. 3424, 82 L.Ed.2d 737 (1984)).

104 S. Ct. at 3421-22.

B

[1, 2] The government contends that it should not have been required by the district court to bear the burden of demonstrating that the law enforcement officers' reliance satisfied the good-faith exception. We disagree. Although we reserved the question of burden allocation

when we decided *Williams,* 622 F.2d at 847, the Supreme Court implicitly resolved the question in *Leon.* The Court noted that "[w]hen officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." 104 S. Ct. at 3422. Once the defendants convinced the district court that probable cause was lacking, the government was required to prove that the evidence seized during the search was nevertheless admissible because of the officers' objectively reasonable reliance on the warrant. The issue may be of little significance, however, because the determination of good faith will ordinarily depend on an examination of the affidavit by the reviewing court. It is to such an examination that we now turn.

III

No attack has been made in this case on the veracity of the allegations in the affidavit, the neutral detachment of the magistrate, or the facial sufficiency of the warrant. In view of the criteria expounded in *Leon,* therefore, the sole question is whether the affidavit of deputy sheriff Martinez was so inadequate as to render official belief in the existence of probable cause entirely unreasonable. We conclude that it was not.

The district court held that probable cause was lacking because the affidavit facts failed to establish a sufficient nexus between Gant's house and the cocaine sought by the law enforcement officers. The court reasoned that the only evidence of a nexus was the officers' inability to discover any place of greater security for the drug transactions, and the observation of Gant and another member of the distribution network together at Gant's house on

an earlier occasion. Other factual allegations in the affidavit, however, could be viewed to support the officers' reliance on the magistrate's probable cause determination.

The affidavit indicated that Gant was a member of a cocaine distribution network, and that he ordinarily distributed the cocaine immediately upon returning to Houston from Florida. The affidavit revealed that law enforcement officers were notified that Gant was about to go to Florida to purchase cocaine. They watched Schneider leave Houston, heading east toward Florida. Two days later, they watched Gant and Schneider return. Both Gant and Schneider appeared weary, and their automobile showed signs of extensive travel. The officers observed Gant as he made a brief telephone call from a public telephone located just five minutes from his house. They then followed Gant and Schneider directly to Gant's house.

[3, 4] These facts could, in the eye of a law enforcement officer, readily support a magistrate's inference that Gant had obtained a load of cocaine and that it was still in his possession at the house. The district court indicated that the magistrate could have concluded easily that the cocaine was located in some other place. The proper test, however, is not what the district court judge would have done if the affidavit had been presented to him, or even what most other magistrates might have done. The test is whether it was entirely unreasonable for these officers to accept the magistrate's belief that, based on this affidavit, cocaine was probably located in Gant's house. The officers knew that the magistrate had knowledge that Gant would quickly distribute the cocaine. If Gant did store the cocaine away from his house, his efforts to retain control of the cocaine and to distribute it quickly would have been impaired. Thus, it was not entirely un-

reasonable for the officers to believe that the magistrate could infer that Gant had retained possession of the cocaine in order to distribute it immediately.

Courts have consistently encouraged law enforcement officers to obtain warrants before conducting searches. *See, e.g., United States v. Chadwick,* 433 U.S. 1, 9, 97 S. Ct. 2476, 2482, 53 L.Ed.2d 538 (1977); *Aguilar v. Texas,* 378 U.S. 108, 110-11, 84 S. Ct. 1509, 1512, 12 L.Ed.2d 723 (1964). *Leon* intended that such encouragement should not be undermined by requiring officials to second-guess the magistrate's determination or by encouraging them to forgo a warrant in reliance on exigent circumstances. As the district court noted, the nexus between the place to be searched and the evidence sought may be established through normal inferences about the location of the evidence. *United States v. Freeman,* 685 F.2d 942, 949 (5th Cir. 1982). In this case, a magistrate believed that inferences permissible from the affidavit facts established probable cause and justified the issuance of a warrant; a district court judge disagreed. Regardless of whether the magistrate's probable cause determination would withstand deliberate legal review, the affidavit facts presented to the magistrate were not so insufficient as to preclude the law enforcement officers' objectively reasonable reliance on his probable cause determination.

Leon teaches us that the suppression of evidence seized from Gant's house serves no deterrent purpose. Because the officers' reliance on the magistrate's determination of probable cause was not entirely unreasonable, the evidence should not have been suppressed. Accordingly, the judgment of the district court is

REVERSED.

APPENDIX "B"

UNITED STATES of America

v.

Richard Allen GANT, John Roger Casquilla,
David Wayne Hill, Deborah Corinne Schneider.

Cr. No. H-83-151.

United States District Court,
S.D. Texas,
Houston Division.

Jan. 24, 1984.

Order May 9, 1984.

Defendants, charged with conspiracy to violate narcotics laws and possession with intent to distribute cocaine, moved to suppress evidence. The District Court, Carl O. Bue, Jr., J., held that the magistrate lacked probable cause to issue warrant for search of defendant's residence.

Motion granted.

Samuel Longoria, Asst. U.S. Atty., Houston, Tex., for plaintiff.

Gerald Goldstein, San Antonio, Tex., Edward Mallett, Houston, Tex., for defendant Gant.

Thomas Berg, Houston, Tex., for defendant Schneider.

ORDER

CARL O. BUE, Jr., District Judge.

Defendants, Richard Allen Gant and Deborah Corinne Schneider, among others,[1] are charged in a two count indictment with conspiracy to violate the narcotics laws and possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1)[2] and 846[3] (1976). The events alleged in the indictment occurred on or about October 31, 1980. Defendants Gant and Schneider have filed motions to suppress evidence obtained as a result of a search warrant purportedly insufficient to sustain a determination of probable cause for its issuance. Specifically, the motions seek to exclude the controlled substances and any other derivative evidence obtained during the search conducted under the authority of the above described search warrant. A suppression hearing was held on November 30, 1983, to determine the facts surrounding both the issuance of the warrant and the subsequent search which led to defendants' arrest. Having

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1. Although there were others who were arrested, only defendants Gant and Schneider now challenge the illegality of the arrest, search and seizure.

2. Title 21, United States Code, Section 841(a)(1) states in pertinent part that:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
> to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

3. Title 21, United States Code, Section 846 states in pertinent part that:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

considered the facts adduced at the suuppression hearing, as well as the memoranda of law submitted by counsel, the Court is of the opinion that the motions should be granted for the reasons stated below.

Facts

On October 31, 1980, a search warrant was issued for the search of the residence described as "11006 Francoise, Houston, Texas, and for the arrest of Richard Allen Gant, Deborah Schneider and Carlos Ivan Orozco." On executing the search warrant, agents discovered approximately five pounds of 90% pure cocaine.

The warrant pursuant to which the search took place was issued on the basis of the affidavit of Officer J.M. Martinez, a Harris County Deputy Sheriff. The affidavit set out the personal observations of Martinez and other agents as well as information obtained by Martinez from an anonymous informant, all of which allegedly gave the officers probable cause to believe that defendants Gant, Schneider and Orozco were in possession with the intent to deliver the controlled substance cocaine.

The affidavit first set out that in early October, 1980, Officer Martinez, who had served as a narcotics officer for 9 years, spoke with Mr. Rosenthal, the major drug offender prosecutor for Harris County, Texas. During that conversation, Rosenthal spoke of a conversation he had had with an attorney who was representing a person indicted for possession of cocaine. As an attempt to secure a low recommendation on a plea bargain agreement, that defendant told his attorney that he bought cocaine on a regular basis, and that Richard Gant was a cocaine dealer whose telephone number was 729-1956

and whose vehicle license plates were entitled "I'M RICH."

According to the affidavit, Rosenthal's information substantially confirmed a conversation Martinez had had with an anonymous informant. In that conversation, the informant, an admitted cocaine user, told Officer Martinez that he had known Mr. Gant for some time because they both purchased drugs from the same source. The informer, who knew Gant's address, thought that Gant dealt mostly with Methaqualone tablets, dressed well, and drove a luxury car with personalized license plates entitled "I'M RICH." The informer stated further that Gant, Don Clemments and "Carlos" worked together in Gant's cocaine distribution network. The affidavit disclosed that Gant, bragging to the informer about his activities as a dealer, explained that Carlos would make arrangements for the cocaine to be at a particular place in Florida after which Gant would drive to Florida with the necessary cash to pick it up. Distribution allegedly occurred immediately upon Gant's return to Houston.

The affidavit set out that on or about October 10, 1980, Martinez, with the assistance of the United States Department of Justice Drug Enforcement Administration (hereinafter "D.E.A."), began intensive surveillance of Gant. The officers had little success in their attempts to follow him, but on one occasion saw Gant and "Carlos" Orozco at Gant's residence. On another occasion, Gant was followed to a local bank where he was observed withdrawing an unknown quantity of money in an extended transaction involving two tellers.

According to the affidavit, on October 28, 1980, Agent Parsons, told Officer Martinez that Donald Clemments,

Jr., alias "Richard Gant", had been arrested in San Diego for possession of one ounce of high purity cocaine as he was boarding an airplane traveling to Houston.[4] Agent Parsons received his information about Clemments from D.E.A. Special Agent Cook, who was assigned to the San Diego area. Cook further explained to Parsons that Clemments had admitted to working for a Houston-based cocaine distribution network which obtained Columbian cocaine from Florida.

Finally, the affidavit disclosed that Officer Martinez received a phone call later that day from his anonymous informer who said that "his source" said that Gant was about to leave for Florida to obtain a load of cocaine. Consequently, surveillance was again initiated. On October 29, 1980, defendant Schneider was seen in a black Cadillac Eldorado, license plates number VFV754, driving eastbound on Interstate 10 in the Houston area.[5] Two days later, the same vehicle was reported as being seen in the Houston area traveling west on Interstate 10.[6] The dusty vehicle was, thereafter, followed to a convenience store where Cant was seen making a phone call. Gant

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4. During the suppression hearing, Agent Parsons testified that the arrest occurred in August, 1980, at least two months prior to the issuance of the warrant.

5. The affidavit stated that the vehicle was seen "October 29 as it remained eastbound having crossed into Trinity County, Texas." However, as pointed out at the suppression hearing, Interstate 10 does not pass through Trinity County; Trinity County is due north of Harris County, not due east. Accordingly, the Court is left with the finding that the vehicle was seen traveling due east in the Houston area.

6. The affidavit stated that the vehicle was seen "driving west on I-10 from Federal road." However, since there was no evidence presented as to which federal road the affiant was referring, the Court is left with the finding that the vehicle was seen traveling due West in the Houston area.

and Schneider, both appearing tired, then proceeded to the Gant residence which was located approximately five minutes from the convenience store. Two days later, agents executed a search warrant on Gant's residence in which they found five (5) pounds of 90% pure cocaine.

Probable Cause

The threshold question for analysis is whether the magistrate, confronted with the affidavit and evidence before him, had probable cause for issuance of the search warrant for Gant's residence. The Court concludes that he did not.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or thing to be seized.

U.S. Const. Amend. IV.

[1, 2] Probable cause exists where "the facts and circumstances within the agents' knowledge, and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a crime had been or is being committed, and that seizable property can be found at the place or on the person to be searched." *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 543 (1925); *Brinegar v. United States,* 338 U.S. 160, 69 S. Ct. 1302, 93 L.Ed. 1879 (1949). It is well settled that a search warrant affidavit may be based upon hearsay.

Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed.2d 697 (1960). In *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States,* 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969), the Supreme Court set out a two-prong test for determining the validity of an affidavit based upon hearsay. It held that the affidavit must contain (1) some of the underlying circumstances from which the officer concluded that the contraband was where he claimed it was, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable. The *Aguilar-Spinelli* test has now been discarded in favor of the "Totality of the Circumstances" approached as described in *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983).

[3-6] When applying the "totality of the circumstances" test

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States, supra,* 362 U.S. at 271 [80 S. Ct. at 736].

Gates, 103 S. Ct. at 2332. Although the court affirmed that the elements of informer credibility and reliability remain highly relevant, under the totality of the circum-

stance approach they should not be understood "as entirely separate and independent requirements to be rigidly exacted in every case . . . [R]ather . . . they should be understood simply as closely intertwined issues that may usefully illuminate the common-sense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." *Id.* at 2327, 2328. Deficiencies on one of the "prongs" may be "compensated . . . by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 2329. Although a magistrate's determination of probable cause should be paid great deference, reviewing courts must still conscientiously review the sufficiency of affidavits on which warrants are issued. *Id.* at 2332.

The Fifth Circuit has recently spoken to the nexus requirement in *United States v. Freeman,* 685 F.2d 942 (5th Cir. 1982). In *Freeman,* the Court stated:

> (T)he fact that there is probable cause to believe that a person has committed a crime does not automatically give the police probable cause to search his house for evidence of that crime . . . We have consistently held that facts must exist in the affidavit which establish a nexus between the house to be searched and the evidence sought. *E.g., United States v. Green,* 634 F.2d 222 (5th Cir. 1981); *United States v. Gramlich,* 551 F.2d 1359 (5th Cir.), *cert. denied,* 434 U.S. 866 [98 S. Ct. 201, 54 L.Ed.2d 141] (1977); *United States v. Maestas,* 546 F.2d 1177 (5th Cir. 1977); *United States v. Flanagan,* 423 F.2d 745 (5th Cir. 1970). However, that nexus may be established either through direct observation or through normal inferences as to where the articles sought would be located.

Freeman, Id. at 949. The court concluded that one cannot simply infer that drugs will be located in a residence just because it is a residence and that more evidence is required to show a nexus between the drug activity and the residence before a search warrant of the residence should issue.[7]

The search warrant affidavit in this case neither meets the totality of the circumstances test nor the *Aguilar-Spinelli* test.

[7] The only statement which the affiant makes regarding the nexus between criminal evidence and the residence is in the last paragraph of the affidavit:

> Lastly your affiant believes the cocaine to be inside said place based upon the informants having seen Gant and Carlos Ivan Orozco . . . together at the said place on a prior occasion and surveillance has failed to show any place of greater relative security for the transactions to be carried on.

Indeed, other statements made in the affidavit discredit the probability that the contraband would be located in Gant's residence.[8] For example, according to the affidavit,

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7. In *Freeman,* the Court suggested that one might reasonably infer that documents such as "passports, identification papers and bank records" would "normally be kept at one's personal residence." However, the Court refused to find such an inference with regard to cocaine. *Id.* at 950-952.

8. The parties argued other grounds regarding the sufficiency of the affidavit. For example, defendant Gant argued that (1) no information was presented in the affidavit to show that either informant was a reliable source, that (2) the affidavit provided no indication of how and where the second informant obtained most of his information and did not show that the hearsay information was verified; and (3) the affidavit was based upon stale information since the description of Gant's drug related activities did not include information about the time at which they occurred. However, the

"intensive surveillance of Gant" was carried out, yet "[a]ttempts to follow [him] often proved unsuccessful." Furthermore, the informant had stated that Gant "distributed the cocaine immediately upon arrival in Houston, because he did not want to risk a lengthy exposure to arrest." The magistrate could easily have concluded that the contraband was either distributed or located in a place other than the residence. Accordingly, the Court concludes that the affidavit provided no nexus between the alleged criminal activity and the residence. Therefore, the affidavit was insufficient to support a finding of probable cause.[9]

Good Faith Exception

[8] The second issue for analysis is whether the good faith exception should be applied to the facts of this case

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government points out, and the Court agrees, that much of the information was corroborated by the direct observation of the agents or by other unrelated informant's statements. For example: (1) Two unrelated informers stated that Gant had personalized license plates entitled "I'M RICH", (2) The informant said that Gant had a partner named "Carlos"; "Carlos" was later observed by agents to be seen with Gant; and (3) The informant said that Gant had a "runner" named Don Clemments; Don Clemments, using the alias "Richard Gant" was arrested in San Diego for possession of cocaine as he was boarding a plane for Houston. However, none of the corroborated statements evidenced a nexus between Gant's residence and the contraband and thus are irrelevant when considering the major infirmity of the affidavit.

9. Defendant Schneider complains also that there was no probable cause in the affidavit to link her with any criminal activity. The Court agrees. The affidavit mentions Schneider only briefly; that she was seen October 29, 1980, in a black Cadillac bearing Texas license plates VFV754, driving eastbound (see note 5, *supra*), and that she was seen two days later in the same automobile with Gant driving westbound (see note 6, *supra*). After applying either the *Aguilar-Spinelli* Test or the totality of the circumstances test, the Court concludes that there was no probable cause to issue a warrant for the arrest of defendant Schneider.

where the search warrant and affidavit were insufficient to support a finding of probable cause. The Court concludes that it should not.

The Fifth Circuit set out the basic guidelines for applying the good faith exception to the exclusionary rule in *United States v. Williams,* 622 F.2d 830 (5th Cir. 1980). In *Williams,* the Court held:

> [E]vidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized.

Id. at 840. Emphasizing that the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good faith ones, the Court went on to say that the cost to society of applying the rule in such a case is too high and has few offsetting benefits. Citing *Michigan v. DeFillippo,* 443 U.S. 31, 38, 99 S. Ct. 2627, 2632, 61 L.Ed.2d 343 (1979), the court said that "suppression still results if officers allege a good-faith belief in a 'law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws' or in a law that violated a 'controlling precedent that [it] was . . . unconstitutional.' " *Williams,* 622 F.2d at 843. Moreover, the court limited the application of the good faith exception saying that "[n]o warrant is involved here, hence nothing that we say applies to factual situations where one has been obtained", *Id.* at 840, n. 1, and "[e]xclusion of evidence seized without probable cause is an entirely different question from suppression of evidence seized upon a good faith and reasonable belief in the existence of probable cause." *Id.* at 846.

The Fifth Circuit recently added to the good faith exception case law in *United States v. Mahoney,* 712 F.2d 956 (5th Cir. 1983). In *Mahoney,* the arrest warrant was found to be invalid on the ground that it did not identify the defendant with sufficient particularity. The court held that the exclusionary rule was inapplicable pursuant to the "good faith exception" since the actions by the law enforcement agents were taken in a reasonable and good-faith belief that they were legal. *Id.* at 956. However, in *Mahoney,* unlike in the case *sub judice,* there was an unchallenged finding of probable cause. Like *Williams,* the *Mahoney* Court limited the use of the good faith exception, saying that "[w]e leave for later the question of whether a good faith proviso to the exclusionary rule ought ever to tolerate an arrest or seizure without probable cause measured objectively." *Id.* at 960, n. 4; *see also United States v. Parker,* 722 F.2d 179, 183 n. 2 (5th Cir. 1983).

Although the *Gates* Court declined to address directly the issue of a "good faith" exception to the exclusionary rule, Justice White, in his concurring opinion, discussed the issue at some length. He reasoned that the exclusionary rule should be modified to allow the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment, but explained that in many instances, such as where the material presented to the magistrate is so clearly lacking in probable cause that no well-trained officer could reasonably have thought that a warrant should issue, the good faith exception should not apply. *Gates,* 103 S. Ct. at 2346 (White, J., concurring).

Here the Court is faced with a warrant lacking in probable cause, and no evidence to "cure" it of its infirmity.

In *United States v. Hill,* 500 F.2d 315 (5th Cir. 1974), *cert. denied,* 420 U.S. 931, 95 S. Ct. 1135, 43 L.Ed.2d 404 (1975), the Fifth Circuit admitted evidence obtained in a search although the warrant, issued upon an insufficient affidavit, was invalid. Allowing the affidavit to be bolstered by the sworn testimony of the agent before the magistrate, the court said:

> [T]his situation furnished no occasion to apply the exclusionary rule to bar the evidence of Hill's criminality that was obtained in executing the warrant. Phillips acted properly in going to the magistrate and seeking a warrant. Magistrate Sear acted properly in calling for additional information to demonstrate credibility. Thus, the only error attributable to the procedure they followed is a technical one that would in no way serve the deterrent purposes of the rule.

Id. at 322.

In the suppression hearing held in this case, there were no facts presented which could bolster or cure the inadequate warrant and affidavit. The officers merely elaborated upon their "good faith reliance" upon a warrant which they did not even read. Such subjective good faith has been patently condemned as a rationale for applying the good faith exception to the exclusionary rule.[10] *Williams,* 622 F.2d at 848; *Mahoney,* 712 F.2d at 6705; *Gates,* 103 S. Ct. at 2344-2347. This Court, obedient to the mandates of the Fifth Circuit and the Supreme Court, cannot now apply the good faith exception to a

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10. *Williams* requires that we also decide whether the officers' subjective good faith was "grounded in an objective reasonableness" and "based upon articulable premises sufficient to cause a reasonable, and reasonably trained officer to believe that he was acting lawfully." 622 F.2d at 841, n. 4a.

situation in which there was no probable cause to search the residence of the defendant, where the precedent is well settled that a nexus must exist between the evidence desired and the place to be searched, where the Fourth Amendment on its face condemns the search of a residence where no probable cause exists, and where the officers' actions were taken with only subjective good faith.

Finally, the Court believes that a deterrent effect is accomplished by the suppression of the fruits of the search in this case. Although field officers are not trained as legal technicians, this is not a case requiring a quick decision as in *Williams,* nor is it a case in which the actions of the officers fall along the "cutting edge of two legal doctrines" as in *Mahoney.* The legal precedent for establishing a nexus between the evidence sought and the place to be searched is well established. To ignore it now might well promote what the exclusionary rule was designed to prevent.

Conclusion

Accordingly, the Court concludes that there was no probable cause to search the residence of defendant Gant, and that the good faith exception should not apply. Therefore, the motions to suppress are granted; all evidence seized pursuant to the execution of the search and arrest warrant on or about October 31, 1980, is to be suppressed.

ORDER

Pending before the Court is government's motion for reconsideration of this Court's Order of January 24, 1984, in which defendants' motions to suppress were granted. Contending that the Court incorrectly assigned the burden of proof on it to establish the applicability of the "good

faith exception" in this case, government asks the Court to either reverse its decision or stay its effect until the United States Supreme Court has ruled on the subject. Defendants submit that the burden was properly placed and oppose the motion to stay. After careful consideration of the memoranda and relevant law, the Court is of the view that the motion should be denied for the reasons discussed below.

I.

Government cites *United States v. Minis,* 666 F.2d 134 (5th Cir.), *cert. denied,* 456 U.S. 946, 102 S. Ct. 2013, 72 L.Ed.2d 469 (1982), to support its first contention that the burden of proof to establish the applicability of the good faith exception was wrongfully placed upon it. Government contends further that it should have been defendants' burden to show a lack of good faith on the part of the arresting officers. The parties have not cited legal authority clearly dictating where the burden of proof should lie with regard to the good faith exception, and the Court's research has revealed none.[1] However, relevant law provides ample justification to affirm this Court's allocation of the burden upon the government.

[9, 10] In general, a person who asserts that his fourth amendment rights were violated has the burden of establishing two requirements. First, that a search and seizure of that individual's person, house, papers or effects was conducted by an agent of the government. And second, that the search and seizure was "unreason-

1. In *United States v. Williams,* 622 F.2d 830, 846, 847 (5th Cir. 1980), the Fifth Circuit reserved for "another day," the "proper allocation of the burden of proof on this issue."

able". *United States v. Bachner*, 706 F.2d 1121, 1125 (11th Cir. 1983); *United States v. Glasgow*, 658 F.2d 1036, 1044 (5th Cir. 1981); *Elkins v. United States*, 364 U.S. 206, 222, 80 S. Ct. 1437, 1446, 4 L.Ed.2d 1669 (1960). However, if the movant establishes an expectation of privacy[2] and that the search and seizure took place without a search warrant, then the burden of proof shifts to the government to establish that an exception to the search warrant requirement is applicable and that the search and seizure was a reasonable one. *United States v. Bachner*, 706 F.2d at 1126; *United States v. Harris*, 479 F.2d 508, 509 (5th Cir. 1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S. Ct. 2022, 2032, 29 L.Ed.2d 564 (1971).

In the case at bar, defendants established that defendant Gant's home was searched and contraband seized by government agents pursuant to a search warrant found by this Court to be lacking in probable cause and, therefore, invalid as a matter of law. Thus, defendants satisfied their burden of proof as to the first two requirements. It follows, from the established line of fourth amendment case law, that the burden of proof should then shift to the government to establish that an exception to the warrant requirement existed and that the search and seizure was, in fact, reasonable. In this Court's view, the "good faith exception" would be yet one more exception which, if proved by the government,

2. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L.Ed.2d 38 (1981), citing *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371 1382, 63 L.Ed.2d 639 (1980).

would save the evidence from the effects of the exclusionary rule. This the government did not do.

The Fifth Circuit in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) held that "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." *Id.* at 840. Though not reaching the allocation of the burden of proof on this issue, that court concluded that:

> Hencefore in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.

Id. at 846, 847. While it is not the district court's function to make law, it is its function to make findings of fact. Given the evidence provided at the suppression hearing in this case, this Court, either because of a lack of evidence presented or because of a lack of evidence in existence, could not make a finding, as government requested, that the conduct of the officers in question was taken in a "reasonable good-faith belief that it was proper." Without such a finding, the Court was impelled to apply, and did apply, the exclusionary rule to suppress the evidence secured by the illegal search and seizure.

II.

[11] Next, government requests that the Court stay the effect of its ruling "until the Supreme Court has ruled on the subject." Government points out that there are two cases currently pending before the United States Supreme Court which present the issue identical to the one in the case *sub judice*. The Court is unpersuaded by government's argument and conludes that it would be unwise to stay this Court's ruling to await the decisions to be handed down in *United States v. Leon*, 701 F.2d 187 (9th Cir.), *cert. granted*, ____U.S.____, 103 S. Ct. 3535, 77 L.Ed.2d 1386 (1983) and *Massachusetts v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725, *cert. granted*, ____U.S.____, 103 S. Ct. 3534, 79 L.Ed.2d 159 (1983), as those decisions may have no relevance to the case at bar.

Conclusion

The Court concludes that government was given ample opportunity at the suppression hearing to establish the applicability of the good faith exception to the case at bar. Not having done so, it can not now expect defendants to assume its burden of proof or await some future opinion of the Supreme Court which may or may not have particular relevance in this case. Accordingly, the Court is of the opinion that government's motion to reconsider should in all things be denied.

It is so ORDERED.

86 1558

FILED

MAR 7 1987

JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD ALLEN GANT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2302

Summary Calendar

D.C. Docket No. CR-H-83-151

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD ALLEN GANT,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Filed March 9, 1987

Before: REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the Judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 17, 1986

ISSUED AS MANDATE: January 8, 1987